IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

FIRST APPEAL NO.757 OF 1991

1. Shri Gulabchand Raichand Osval,
2. Shri Mulchand Raichand Osval,
3. Shri Dalichand Raichand Osval,
4. Shri Chandanmal Juharmal Osval,

.. **Appellants**
(Original defendants)

.. **Versus** ..

Shri Mumtazbhai Yahyabhai Shaikh,

(Original Plaintiff) .. **Respondent**
(Original plaintiff)

.....

Mr. Mahesh Subramanium, Advocate for the appellants, Smt. Anita A. Agarwal, Advocate for the respondent.

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CORAM : K. J. ROHEE, J.
DATED : 4th APRIL, 2006.

Oral Judgment :

1. The appellants are the original defendants. They

have preferred the present appeal against the judgment and decree passed by the 5th Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.849 of 1986 on 28.3.1991.

2. Almost all the facts are admitted and there is little dispute about facts. The appellants are the owners of field survey no.60/2, measuring 0 Acre 30 gunthas (3600 sq. yards) of village Walvan, Taluka - Maval, District – Pune. The appellants are in possession of the said land. On 22/8/1983 the appellants entered into an agreement of sale of the said land with the respondent. The rate of the land was fixed at Rs.90/- per sq. yard. On 22/8/1983 the terms of the agreement were reduced into writing. Appellant no.1 signed the agreement of sale in favour of the respondent on behalf of the rest of the appellants by holding Special Power of Attorney for them. On the same day the respondent paid Rs.30,000/- to appellant no.1 as earnest money. The rest of the amount was to be paid at

the time of execution of the sale deed which was to be executed on or before 31/8/1983. The appellants were to get the land measured through private or government surveyor and the price was to be paid as per the area measured. The appellants were to obtain income tax clearance certificate before execution of sale deed. The appellants were to ensure that the land was having clear title and without any encumbrance. In case the sale transaction could not be completed because of the fault on the part of the respondent within time, he was to pay extra price of Rs. 0.75 ps. per sq. yard per month to the appellants. Such extension of time was to be only till 30/8/1984. In case, the sale transaction could not be completed before that date by the respondent, the appellants had right to cancel the agreement and to forfeit the amount of earnest money. On 26/8/1986 the respondent issued a letter to the appellants informing him that the respondent was prepared and ready to get the

sale deed executed and that the appellants should comply with their obligation. Immediately thereafter on 28/8/1986 the respondent instituted suit for specific performance of the said agreement and for possession of the said land. Alternatively, the respondent claimed refund of earnest money with damages to the extent of the agreed price.

3. The appellants resisted the suit by their written statement and additional written statement. According to them time was the essence of the agreement of sale. The respondent failed to perform his part of the contract because of which the appellants became entitled to cancel the agreement of sale and forfeit the amount of earnest money. Since the respondent failed to abide by the terms of the agreement the said agreement was terminated by the appellants. The appellants could not obtain income tax clearance certificate because the respondent failed to supply draft of the proposed sale deed. Thus there was no negligence on the part of the appellants, but inaction on

the part of the respondent. By sale deed dated 20/10/1979 the appellants sold half of the land to one Abbasbhai, the land was sub-divided into two parts and separate survey numbers were allotted to them. Survey No.60/2/1 has been given to the suit land and there was no question of making its demarcation. In fact, the said land was also got converted to non-agricultural land by the appellants. The respondent did nothing for a period of more than about 2-1/2 years. The respondent did not offer balance consideration to the appellants which shows that he was not ready and willing to purchase the said field. It is only when the respondent realized that the prices of land have shot up tremendously, he filed false suit to earn wrongful gain for himself. The suit is thus liable to be dismissed.

4. The respondent examined himself as PW 1 and his brother-in-law Salim Isac Sheikh as PW 2. Appellant no.1 Gulabchand is examined as DW 1. The parties have filed several documents.

5. After considering oral and documentary evidence the learned trial Judge held that the appellants failed to prove that time was the essence of contract; that the respondents failed to prove that the respondent was to give draft of the sale deed to them for obtaining income tax clearance certificate and that the respondents failed to prove that the respondent has not performed his part of the contract. The learned trial Judge held that the respondent proved that he was and is ready and willing to perform his part of the contract and as such he is entitled to a decree for specific performance of the contract. Accordingly the learned trial Judge decreed the suit in favour of the respondent which has been challenged by the appellants.

6. I have heard Mr. Mahesh Subramanium, Advocate for the appellants and Smt. Anita Agarwal, Advocate for the respondent. I have also gone through the record and proceedings of the trial court with the able assistance of the learned counsel for the parties.

7. The following points arise for my determination and I give my findings to them are as under :

	Points		**Findings**
(i)	Whether time was the essence of contract ?	...	No.
(ii)	Whether the appellants committed breach of the agreement ?	...	Yes.
(iii)	Whether the respondent was and is ready and willing to perform his part of the contract ?		Yes.
(iv)	Whether the respondent is entitled for specific performance of the contract ?	...	Yes.
(v)	What order ?	...	The appeal is dismissed.

R E A S O N S

8. Mr. Mahesh Subramanium, the learned counsel for the appellants, urged that term no.2 in the agreement dated 22/8/1983 (Exh.26) clearly shows that the sale transaction was to be completed before 31/8/1983. Term

No.12 clearly shows that the extended period for completion of the sale transaction would be only till 30/4/1984. The learned counsel for the appellants, therefore, submitted that the time was the essence of contract.

9. Smt. Anita Agarwal, the learned counsel for the respondent, on the other hand, submitted that it is a settled law that in case of agreements relating to immovable property normally time is not the essence of contract. The parties have to agree upon a specific term making the time essence of contract. She submitted that the present case does not fall in exceptional category.

10. A perusal of the agreement of sale (Exh.26), no doubt, shows that the sale transaction was to be completed before 31/8/1983. However, at the same time, it prescribes that in case the sale transaction could not be completed because of the purchaser he was to pay Rs.0.75 ps. per sq. yard per month as additional price of

the land. However, such extended time would be only till 30/4/1984. It further shows that in case the purchaser did not complete the sale before 30/4/1984 the sellers will have right to cancel the agreement of sale and to forfeit the amount of earnest money.

11. It is apparent that the agreement itself shows that the deadline would be extended till 31/1/1984. This clearly shows that the time was not the essence of contract. Secondly, the sellers were to get right to cancel the agreement and to forfeit the amount of earnest money, in case, the purchaser failed to complete the sale transaction before 30/4/1984. However, in the present case, the appellants, who are sellers, never informed the respondent by issuing any communication that the purchaser failed to perform his part of the contract and hence they are cancelling the agreement and forfeiting the amount of earnest money. Thus the trial court has rightly held that the time was not the essence of the contract.

12. Term No.3 of the agreement (Exh.26) dated 22/8/1983 shows that the sellers (the appellants) were to get the land measured by private or government surveyor. The appellants have nowhere shown that after the agreement of sale dated 22/8/1983 they ever took any step for getting the land measured. On the contrary their defence is that since they had already sold half of the land to Abbasbhai in 1979 and separate sub-division was given to the suit land, there was no need to measure the land. This clearly shows that the appellants failed to get the land measured as agreed. Thus they are responsible for the breach of agreement.

13. Term No.5 of the agreement of sale (Exh.26) shows that the sellers/appellants were to obtain income tax clearance certificate before execution of the sale deed. The evidence adduced by the appellants nowhere shows that they ever applied to the income tax authorities for the said certificate. On the contrary, according to the

appellants, it was necessary for the purchaser/respondent to supply draft of the proposed sale deed for obtaining income tax clearance certificate. This excuse on the face of it is lame because such a draft could have been prepared even by the appellants and they could have showed the same to the respondent for his approval. However, the appellants did nothing and merely wanted to shift the blame to the respondent. It is thus obvious that the appellants committed breach of agreement.

14. It is true that there was no communication in writing between the appellants and the respondent between 22/8/1983 to 26/8/1986. It appears that the respondent issued a letter (Exh.27) to the appellants for the first time on 20/8/1986 informing them that he was prepared and ready for obtaining the sale deed and requested the appellants to comply with their obligations. The respondent by leading evidence of PW 2 Salim Isac Sheikh tried to show that on 16/8/1983 the respondent and

Salim visited the house of appellant no.1 and asked him to complete the measurement of suit land by surveyor. Even if this evidence is believed it is apparent that from 22/8/1983 till 16/8/1986 no steps were taken by the respondent. It is however important to note that during this period the appellants also did nothing though under the terms of the agreement discussed earlier they were to take certain steps. The appellants replied the letter of the respondent dated 26/8/1986 as late as on 10.10.1986 i.e. after institution of the suit by the respondent on 28/8/1986. This shows that the appellants were not ready and willing to perform their obligation under the said agreement of sale. The evidence led by the respondent, on the other hand, shows that all the while he was ready and willing to pay the balance to the appellants. As observed by the learned trial Judge this has been proved by the respondent by producing pass books Exh.30 and 31. Hence it will have to be held that the respondent has established that all the

while he was ready and willing to perform his part of the contract.

15. Smt. Anita Agarwal, the learned counsel for the respondent, submitted that the appellants have first to show their readiness to perform their obligation and, thereafter, the question of inability of the respondent to make payment of the balance amount would arise. She submitted that in fact the appellants backed out from the agreement and avoided to perform their part of the contract. She submitted that the appellants' lack bonafides. Once they admit the execution of agreement of sale, they have to show their readiness and willing to perform their part of the contract. In fact, it was obligatory on the part of the appellants firstly to inform the respondent that they have complied with the terms of the agreement and only thereafter the question of readiness and willingness of the respondent would arise. She submitted that the trial court has properly appreciated the evidence in

this regard and there is no reason for interference. I fully agree with these submissions.

16. The trial court has exercised its discretion in granting specific performance of the contract of sale and I see no reason to interfere with the said discretion. Thus I find no force in the appeal. Hence the order :

17. The appeal is dismissed with costs.

(K. J. Rohee, J.)

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